ALLIANCE BANK MALAYSIA BHD v. SUREENDHRAN SUBRAMANIAM & ANOR

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK JC
[CIVIL SUIT NO: BA-24FC-244-03-2020]
25 FEBRUARY 2021

CIVIL PROCEDURE: *Stay of proceedings – Application for – Banking – Bank commenced foreclosure proceedings against borrower following default of repayment of loan facilities – Application for stay of proceedings by borrower of bank's action pending borrower's suit against developer – Whether borrower had shown 'something quite exceptional' and 'cause to the contrary' to warrant stay of proceedings – Whether borrower had legal right to postpone or stay bank's foreclosure proceedings*

BANKING: *Loan facility – Default – Borrower charged property to bank in execution of loan facilities – Bank commenced foreclosure proceedings against borrower following default of repayment of loan facilities – Application for stay of proceedings by borrower of bank's action pending borrower's suit against developer – Whether bank's rights of foreclosure could be defeated by borrower's dispute with developer – Whether bank's interest as registered chargee indefeasible*

The defendants had charged its property to the plaintiff in the execution of loan facilities granted by the latter to the former. When the defendants defaulted in their repayment of the facilities, the plaintiff terminated and recalled the same and commenced foreclosure proceedings against the property. The defendants filed the present application for stay of the foreclosure proceedings pending the defendants' suit against the developer ('civil suit') where the defendants sought, *inter alia*, (i) the rescission of the sale and purchase agreement ('SPA') entered into between the defendants and the developer; and (ii) refund of the purchase price ('encl. 8'). Objecting to encl. 8, the plaintiff argued that (i) the defendants failed to show special circumstances warranting stay of proceedings; (ii) the SPA and the loan facilities were two distinct and separate contracts and the defendants remained liable under the facilities agreement regardless of the alleged illegality of the SPA; (iii) the SPA was entered into between the defendants and the developer without the plaintiff's involvement; (iv) upon the defaults of the defendants, the plaintiff had the rights to exercise its powers under the National Land Code ('NLC') to proceed with the foreclosure proceedings against the property; (v) the defendants were attempting to avoid their obligations for the repayment of the loan facilities and obtain an advantage undeservedly through the filing of the civil suit and encl. 8 to deny the plaintiff's right as the registered chargee for an order for sale against the property which was clearly an afterthought and an abuse of court process; (vi) the defendants' allegations against the developer *ie*, misrepresentation

and rescission, would not defeat the plaintiff as the secured chargee of its *in rem* rights conferred under the NLC to obtain an order for sale against the property; and (vi) mere allegations by the defendants against the developer did not fall within the ambit of cause to the contrary and was not sufficient for the defendants to relief solely to resist the plaintiff's application to obtain an order for sale against the property.

Held (dismissing encl. 8 with costs):

(1) In their notice of application and affidavit-in-support, the defendants relied solely on preservation of *status quo* but had not shown 'something quite exceptional', as enunciated in *Ling Peek Hoe & Anor v Golden Star & Ors*. (para 25)

(2) The defendants had not shown (i) any 'cause to the contrary' to warrant a stay or postponement of the bank-chargee's exercise of its statutory remedy of foreclosure sales; and (ii) any breach of the facilities agreement on the part of the plaintiff; even if there were mere breaches by the charge of the loan agreement, such *in personam* claims would not defeat the *ad rem* rights of the chargee to an order for sale. Furthermore, the outcome of the civil suit, even if it were in favour of the defendants, would not have a critical impact or significant influence on the outcome of the present suit by the plaintiff. (para 27)

(3) A bank-chargee's rights of foreclosure could not be defeated or adversely affected by the borrower's disputes with the developer/vendor and the bank's interest as a registered chargee is indefeasible in spite of the purchaser-borrower's disputes with the vendor-developer. The balance tilted in favour of allowing the foreclosure sale to proceed without further delay as delay would increase the interest accruing interests, the bank-chargee would still be able to readily recover the shortfall amount from the defendants. (para 27)

Obiter:

(1) If the court were to grant a stay of foreclosure proceedings pending the outcome of the borrower-purchaser suit against the developer/vendor where the borrower-purchaser alleges misrepresentation or breach or any vitiating circumstance to avoid or rescind the SPA, then all foreclosure proceedings by banks and financial institutions would similarly be liable to be easily stayed and delayed by the borrowers-purchasers as what the borrowers-purchasers need to do is merely to file a court suit against the developer/vendor with allegations to avoid or rescind the SPA. Such stay of foreclosure proceedings would be very detrimental to the banking and financing system as a whole. (para 32)

Case(s) referred to:

AB (Sudan) v. Secretary of State for the Home Department [2013] EWCA Civ 921 ***(refd)***
Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals [2011] 7 CLJ 909 FC ***(refd)***
Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khiun Fui [1978] 1 LNS 28 FC ***(refd)***
CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***
Edelsten v. Ward (No 2) (1988) 63 ALJR 346 ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Ling Peek Hoe & Anor v. Golden Star & Ors [2020] 9 CLJ 601 CA ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
PP v. Dato' Sri Mohd Najib Hj Abd Razak [2019] 6 CLJ 561 FC ***(refd)***
R (On The Application of AO & AM) v. Secretary Of State For The Home Department [2017] UKUT 168 ***(refd)***
Re Chai Min Sin, ex p MBf Finance Bhd [2004] 5 CLJ 272 HC ***(refd)***
Re: Hj Abdul Majid Khan v. Ex Parte Bank Bumiputra Malaysia Bhd [2006] 1 LNS 116 HC ***(refd)***
Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***
Univein Sdn Bhd v. Malaysia Building Society Bhd [2003] 2 CLJ 514 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 65, 66
Courts of Judicature Act 1964, Schedule para 11
Rules of Court 2012, O. 4 r. 1, O. 34 r. 1(1)(b), O. 92 r. 4

For the applicant - Syarifah Dewi Siti Fatimah Syed Ahmad Fahmi Wafa; M/s KY Sim & Co
For the respondent - Mugunthen Vadiveloo; M/s Mugu & Sufyan & Co

Reported by Najib Tamby

JUDGMENT
(encl. 8)

Tee Geok Hock JC:

Introduction

[1] The main question in this interlocutory application is whether a purchaser-borrower has a legal right to postpone or stay the lender-bank's foreclosure proceedings against his property on the ground that the purchaser-borrower, now in default of his repayment obligations *vis-a-vis* the lender-bank, has a pending court suit against the developer-vendor wherein the purchaser-borrower claims for rescission of the property sale and purchase agreement on ground of alleged false or fraudulent representations on the part of the developer.

[2] On 4 January 2021, this court took the view that the abovementioned question should be answered in the negative and therefore dismissed the defendants' stay application in encl. 8.

[3] Dissatisfied with the said decision, the defendants have appealed to the Court of Appeal.

[4] At the outset, it is to be noted that there were two decisions of this court which were delivered on 4 January 2021, as summarised below:

(i) Enclosure 8 (defendants' application to stay proceedings in the present suit pending the disposal of the defendants' suit against the developer-vender on Kuala Lumpur High Court Writ of Summons No. WA-22NCVC-474-07/2019.

Decision of this court on encl. 8:
Enclosure 8 is dismissed with costs

(ii) Enclosure 1 (plaintiff's originating summons for order of sale):

Decision of this court on encl. 1:
Enclosure 1 is allowed with costs.

[5] By a notice of appeal dated 2 February 2021 the defendants have appealed against this court's decision on encl. 8 (stay application). No appeal has been filed against this court's decision on encl. 1 (originating summons).

Background Facts

[6] At all material times, the defendants are the registered owner of a property held under Hakmilik Sementara HS(D) 31944, PT 45153, Mukim of Dengkil, District of Sepang, State of Selangor ("the said property"). See para. 3 and exh. "ABMB-1" of the plaintiff's affidavit-in-support (encl. 3).

[7] At the request of the defendants, the plaintiff had *vide* a letter of offer dated 16 May 2017 ("the said letter of offer") and facility agreement dated 23 August 2017 ("the said facilities agreement") executed between the defendants and the plaintiff, granted a housing loan facility for a sum of RM1,561,765.50 ("the said housing loan") and an overdraft facility for a sum of RM200,000 ("the said overdraft facility") together with interest subject to the terms and conditions of the said letter of offer and the said facilities agreement ("the said loan facilities") for the purpose of financing the said property. See para. 4 and exh. "ABMB-2" the plaintiff's affidavit-in-support (encl. 3).

[8] In consideration of the loan granted, the defendants have charged the said property to the plaintiff's *vide* Charge Presentation No. 72179/2019 registered on 14 August 2019 as a security for the said loan facilities. See para. 5 and exh. "ABMB-3" of the plaintiff's affidavit-in-support (encl. 3).

[9] As a result of the defendants' default in repayment of monthly instalments, the plaintiff has terminated and recalled the loan facilities and commenced foreclosure proceedings against the said property and commenced foreclosure proceeding against the property. See paras. 8 and 9 and exh. "ABMB-4" of the plaintiff's affidavit-in-support (encl. 3).

[10] The defendants have filed this application in encl. 8 for stay of the plaintiff foreclosure proceedings pending the disposal of the defendants' civil suit against Lush Development Sdn Bhd ("the developer") whereby the defendants are seeking, amongst others, the rescission of the sale and purchase agreement entered between the defendants and the developer and a declaration that the developer shall refund the monies released by the plaintiff for the purpose of financing the said property.

Legal Principles On Stay Of Proceedings

[11] The plaintiff's counsel cited the High Court case of *Re: Haji Abdul Majid Khan v. Ex Parte Bank Bumiputra Malaysia Bhd* [2006] 1 LNS 116; [2005] MLJU 233 which followed another High Court decision in *Re Chai Min Sin, ex p MBf Finance Bhd* [2004] 5 CLJ 272; [2003] 6 MLJ 695 to the effect that "the principles to be applied in application for stay of execution are also applicable to an application for stay of proceedings."

[12] In the *locus classicus* of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, the Federal Court held that an application for stay of execution of the court order pending appeal is to be allowed only where the applicant can show special circumstances and that nugatoriness of the subject-matter of appeal is a species of special circumstances. *Kosma Palm Oil Mill* case was also relied upon by both the plaintiff and the defendants in our present case.

[13] In *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465; [2005] 3 MLJ 132 the Court of Appeal applied the *Kosma Palm Oil Mill*'s requirement of special circumstances in stay of execution of court order pending appeal to an application for stay of court proceedings pending an appeal against the judge's refusal to recuse himself on the alleged ground of bias. The nature of the stay application in *Rowstead Systems* case can be considered as stay of recusal-refusal decision pending appeal. *Rowstead Systems* case was relied upon by the defendants in our present case.

[14] Over the years, there has been a misconception among some lawyers who have equated a stay of execution of court order pending appeal with a stay of court proceedings with or without pending an appeal. *Re Chai Min Sin* case relates to a stay of bankruptcy proceeding pending an appeal against dismissal of application to set aside a judgment in default. As such, *Re Chai Min Sin*'s case can be considered as a stay of court order pending appeal. *Re Haji Abdul Majid Khan* relates to the stay of proceedings (ie, appeals in the High Court) pending appeal against High Court's dismissal of the application to strike out the appeals.

[15] Recently, our Court of Appeal has succinctly explained the difference between stay of execution pending appeal and stay of proceedings. In *Ling Peek Hoe & Anor v. Golden Star & Ors* [2020] 9 CLJ 601; [2020] MLJU 1233 Hanipah binti Farikullah JCA delivering the judgment the Court of Appeal explained the difference between stay of execution pending appeal and stay of proceedings in the following words:

> [45] The issue of staying proceedings was the subject of detailed consideration by the Court of Appeal in *AB (Sudan) v. Secretary of State for the Home Department* [2013] EWCA Civ 921. The court firstly contrasted a stay of proceedings with a stay of enforcement of a judicial decision or order. It emphasised that stay of proceedings issue involves case management decisions. It added at para [25]:
>
> > 27. A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.
>
> > 28. In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the applicant may be asking the court to use its powers to give him, for as long as he can secure it, a benefit that he may not obtain at the trial.
>
> [46] The English Court in *R (on the application of AO & AM) v. Secretary of State for the Home Department* [2017] UKUT 168 (1AC) referred to *AB (Sudan)* (*supra*) and stated as follows:
>
> (i) Every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation.
>
> (ii) The judicially imposed delay flowing from a stay order requires good reason.

(iii) Judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former.

(iv) Great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case.

[47] The case of *AB (Sudan) and R (On The Application Of AO & A*M) were cited with approval recently by the Federal Court in *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2019] 6 CLJ 561; [2019] 4 MLJ 421.

[48] The position in Australia is that generally jurisdiction of the courts to stay civil or criminal proceedings pending appeal is an exercise of the inherent jurisdiction of the courts (See: *Jennings Construction Ltd v. Burgundy Royale Investments Pty Ltd (No 1)* (1986) 161 CLR 68 at p. 684; *Fuller & Cummings v. Director of Public Prosecutions (Cth)* (1994) 68 ALJR 611). Being an extraordinary jurisdiction, exceptional circumstances must be shown before its exercise is warranted. Keeping matters in *status quo* until the litigation is finally resolved is not the purpose for which the inherent jurisdiction is invoked. Something quite exceptional must be shown before that jurisdiction is exercised (*Edelsten v. Ward (No 2)* (1988) 63 ALJR 346). (see: *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2019] 6 CLJ 561; [2019] 4 MLJ 421)

[49] We are not able to find any reported case which has decided an application to stay a suit pending the outcome of the review application filed in the Federal Court. We are of the view that the court may only stay a proceeding pending the outcome of a review application in the Federal Court pursuant to the court's inherent power under O. 92 r. 4 of the RC, so as to prevent injustice and abuse of court process. (see *AmBank (M) Bhd v. Metal Reclamation (Industries) Sdn Bhd & Ors* [2016] 10 CLJ 205). Order 92 r. 4 of the ROC provides as follows:

> *For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court*. (emphasis added)

[50] In light of O. 92 r. 4 of ROC and the authorities cited in paras. 46 and 48 above, we regard the jurisdiction involved by the High Court as exceptional, that is to say, it is a jurisdiction which should not be exercised unless it appears that the order appeal from it will affect an injustice and the injustice can be avoided by the intervention of the court.

[51] We are of the view that the review application in the Federal Court, would have an implication upon the outcome of the present case. However, it must be emphasised that it is undesirable at this stage to canvass the argument of whether the review application will succeed.

[52] As correctly pointed out by learned counsel for the defendants, the granting of leave by the High Court does not amount to a finding of committal. It is merely an *ex parte* vetting process to consider there was a *prima facie* case of contempt. In the case of *Foo Khoon Long v. Foo Khoon Wong* [2009] 1 LNS 850; [2009] 9 MLJ 441 it was stated that:

A [20] Be that as it may, it is also important to state the fact this court had granted leave to the said applicant to commence this committal proceeding against the respondents pursuant to an *ex parte* application (encl. 22) did not necessarily mean that this court was satisfied that the charge has been proved beyond reasonable doubt. At the time when the court had granted leave B on 11 June 2007, it is pertinent to observe that there was only a *prima facie* case of contempt, which based on an *ex parte* application. In other words, it is merely a vetting process on an *ex parte* basis to consider if there was a *prima facie* of contempt and the court did not go into the merits (see *Wee Choo Keong v. MBI Holdings Bhd & Anor And Another Appeal* [1993] 2 MLJ 217).

C [53] It is undeniable that if the respondents were ultimately to succeed on the review application, the severity of prejudice that could be suffered by the defendants is apparent if the stay of committal proceeding is not allowed as the committal proceeding is a proceeding that is penal in nature. The issue on the balance of justice is therefore in favour of the D defendants.

[54] We were, therefore, not persuaded that there has been an error to warrant an appellate intervention in the exercise of discretion by the learned JC in the grant of stay of the committal proceeding.

E Neither party in our present case cited *Ling Peek Hoes*' case in their respective submissions.

[16] The defendants have also relied upon the following passage of the Federal Court's judgment in *Chip Chong Sawmill Co Sdn Bhd & Ors v. Chai Khiun Fui* [1978] 1 LNS 28; [1978] 1 MLRH 420:

F Quite apart from and independent of all specific practice rules, the High Court has an inherent jurisdiction to dismiss or stay or otherwise nullify all actions or proceedings which are shown to its satisfaction to be vexatious or oppressive, or constitute an abuse of its process.

[17] In para. 11 of the Schedule to the Courts of Judicature Act 1964, G power to stay proceedings is given to the High Court in the following terms:

11. Power to discuss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

H **[18]** Order 92 r. 4 of the Rules of Court 2012 provides as follows:

Inherent powers of the Court (O. 92 r. 4)

4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent I an abuse of the process of the Court.

[19] Under case management powers of O. 34 r. 1(1)(b) "the court may, at any time after the commencement of proceedings, of its own motion, ... [make] ... such directions ... as to the future course of the action as appear best adapted to secure just, expeditions and economical disposal thereof." When dealing with consolidation of causes of matters under O. 4, the court "may order any of the causes or matters to be stayed until after the determination of any other of the causes or matters."

[20] Based on the Rules of Court 2012 and the decided authorities of the appellate courts, the legal principles which can be gleaned therefrom in respect of stay applications can be summarised as follows:

(i) There is a difference between a stay of execution of judgment or order pending appeal and a stay of court proceedings.

(ii) For stay of execution of judgment or order pending appeal, the legal principles applicable are laid down by the Federal Court in *Kosma Palm Oil Mill* (*supra*), the *locus classicus* on the subject.

(iii) The High Court has powers to order a stay of court proceedings in the following situations:

(a) *res judicata* or multiplicity of proceedings: para. 11 of the Schedule to the Courts of Judicature Act 1964;

(b) inherent powers to prevent injustice or to prevent an abuse of the process of the court: O. 92 r. 4 of the Rules of Court 2012; *Chip Chong Sawmill* case (*supra*); and

(c) temporary stay pursuant to case management powers of the High Court to give directions for smooth, expeditious and economical disposal of court proceedings : O. 34 r. 1(1)(b) and O. 4 r. 1 of Rules of Court 2012.

(iv) The general powers of stay of proceedings under O. 34 r. 1(1)(b) or O. 4 r. 1 of the Rules of Court 2012 are to be exercised in accordance with the guidance of the Court of Appeal's decision in *Ling Peek Hoe* case (*supra*) who approved and accepted the English Court of Appeal's decision in *AB (Sudan) v. Secretary of State for the Home Department* [2013] EWCA Civ 921, the English court in *R (on the application of AO & AM) v. Secretary of State for the Home Department* [2017] UKUT 168 (1AC) and the cases of *Edelsten v. Ward (No 2)* (1988) 63 ALJR 346) and *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2019] 6 CLJ 561; [2019] 4 MLJ 421.

Enclosure 8 : Defendants' Application For Stay Of Proceedings

[21] In encl. 8, the defendants' ground of application of stay of proceeding is that this application is for preserving the *status quo* of the parties pending the disposal of the Kuala Lumpur High Court Suit No. WA-22NCvC-474-07/2019 ("the SPA suit against developer"): item 5 of notice of application.

The SPA suit against developer was filed by the defendants/purchasers herein against the developer who sold the said property to the defendants/purchasers, and in that suit the defendants/purchasers alleged that they entered into the sale and purchase agreement to purchase the said property due to alleged false representation of the developer and therefore the defendants/purchasers prayed for termination or rescission of the sale and purchase agreement and for refund of the purchase price and ancillary reliefs.

Contentions Of The Parties

[22] In the defendants' submissions, the defendants contended that they had the following reasons to warrant the exercise of discretion to stay in favour of the defendants:

(i) it is argued that the defendants' rights as a litigant in the SPA suit against developer will be severely compromised if the defendants' property were auctioned off before a determination of the SPA suit against developer: para. 19 of defendant's written submissions (encl. 13);

(ii) the defendant submitted that if the said property were to be auctioned off to a third party, the defendants' ability to seek relief under ss. 65 and 66 of the Contracts Act 1950 will be greatly affected as the parties cannot be put back under the original positions: para. 20 of defendant's written submissions (encl. 13);

(iii) it is the defendants' contention that they will be injuriously affected as there is no damage that will be occasioned to the plaintiff that the defendant cannot compensate with costs: para. 22 of defendant's written submissions (encl. 13); and

(iv) the defendants submitted that it will be expedient for the Shah Alam High Court, in terms of time and effort, to grant a stay of proceedings as should the defendant ultimately succeed in the SPA suit against developer, it will obviate the need for the plaintiff in the instant suit to auction off the property to recover its monies.

[23] On the other hand, the plaintiff in their written submissions have contended that the discretion should be exercised by refusing stay because:

(i) The defendants have failed to show special circumstances which warrant stay of proceedings.

(ii) The sale and purchase agreement and the loan facilities are two distinct and separate contracts and the defendants/borrowers remain liable under the facilities agreement regardless of the alleged illegality (if any) of the sale and purchase agreement.

(iii) Further to the above, the plaintiff submitted that the SPA was entered between the defendants and the developer without any involvement of the plaintiff. Therefore, the defendants now cannot rely on their own omission to ensure that the said property was free from any legal

infirmity to defeat the plaintiff's rights to exercise its rights and powers conferred under the National Land Code as registered chargee to foreclose the said property and for recovery of the outstanding loan.

(iv) Hence, it was submitted by the plaintiff that upon default of the defendants, the plaintiff has the rights to exercise its powers conferred under the National Land Code to proceed with the foreclosure proceedings and it is entitled for an order for sale against the property unless the defendants have succeeded to prove to the satisfaction of the court on the existence of cause to contrary in this case by adducing evidence through their affidavit.

(v) Based on the foregoing submission, the plaintiff submitted that the SPA suit against developer is a commercial dispute which does not constitute special circumstances that would warrant the court to grant for a stay order whereby any damages suffered by the defendants (if any) could be compensated by cost.

(vi) In addition to the above, the plaintiff submitted that the defendants are now attempting to avoid their obligations(s) for the repayment of the loan facilities and obtain an advantage undeservedly through filing of the SPA suit against developer and the stay application to deny the plaintiff's right as the registered chargee for an order for sale against the said property which clearly an afterthought and an abuse of court process.

(vii) Notwithstanding of the above, the plaintiff submitted that the defendants' allegation(s) against the developer on the misrepresentation and rescission of the SPA will not defeat the plaintiff as the secured chargee of its *in rem* rights conferred under the National Land Code to obtain an order for sale against the said property.

(viii) It was further submitted by the plaintiff that mere allegations by the defendants against the developer do not fall within the ambit of cause to contrary and are not sufficient for the defendants to relief solely to resist the plaintiff's application to obtain an order for sale against the said property.

Decision Of This Court

[24] In our present case, the ground of the defendants' encl. 8 application for stay of proceedings is to the preservation of *status quo* pending the outcome of the SPA suit against developer. In *Ling Peek Hoe* (*supra*) the Court of Appeal approved the principle that "keeping matters in *status quo* until the litigation is finally resolved is not the purpose for which the inherent jurisdiction is invoked. Something quite exceptional must be shown before that jurisdiction is exercised": see para. [48] of the reported judgment.

[25] As the defendants in their notice of application and affidavit-in-support relied solely on preservation of *status quo* and have not shown "something quite exceptional", encl. 8 should, by this reason alone, be dismissed.

[26] Even if encl. 8 were to be considered in accordance with the factors explained in *R (On The Application Of AO & AM) v. Secretary Of State For The Home Department* [2017] UKUT 168 (1AC) which was impliedly approved by our Court of Appeal in *Ling Peek Hoe* (*supra*), the factors are:

(i) Every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation.

(ii) The judicially imposed delay flowing from a stay order requires good reason.

(iii) Judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former.

(iv) Great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case.

[27] On the basis as stated in the immediately foregoing paragraph, the following points are to be noted:

(i) the plaintiff has strenuously opposed the defendants' stay application in our present case;

(ii) there are appellate court's decisions that a bank-chargee's rights of foreclosure cannot be defeated or adversely affected by the borrower's disputes with the vendor/developer and that the bank's interest as a registered chargee is indefeasible in spite of the purchaser-borrower's disputes with the vendor-developer: *CIMB Bank Bhd v. Ambank (M) Bhd & Ors* [2017] 9 CLJ 145; [2017] 5 MLJ 142 (Federal Court); *Chang Yun Tai & Ors v. HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909 (Federal Court);

(iii) the balance tilts in favour of allowing the foreclosure sale to proceed without further delay, as delay would increase the interest accruing interests, the bank-charge would still be able to readily recover the shortfall amount from the defendants:, see *Univein Sdn Bhd v. Malaysia Building Society Bhd* [2003] 2 CLJ 514; [2003] 4 MLJ 618 (Court of Appeal);

(iv) in our present case, the defendants have not shown any "cause to the contrary" to warrant a stay or postponement of the bank-chargee's exercise of its statutory remedy of foreclosure sales;

(v) in our present case, the defendants have not alleged or shown any breach of the facilities agreement on the part of the plaintiff bank; even if there were more breaches by the charge of the loan agreement, such *in personam* claims would not defeat the *ad rem* rights of the chargee to an order for sale : Supreme Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77; and

(vii) the outcome of the SPA suit against developer, even if it were in favour of the defendants, will not have a critical impact or significant influence on the outcome of the present suit by the plaintiff bank for an order of sale pursuant to legal charge.

[28] The continuity of the bank-lender's rights and remedies against the purchaser-borrower notwithstanding the voidness of the sale and purchase agreement in a transaction of financing of purchase under void agreement is clearly decided by our Federal Court in *Chang Yun Tai & Ors v. HSBC Bank (M) & Other Appeals* [2011] 7 CLJ 909. In the Federal Court decision of *Chang Yun Tai & Ors v. HSBC Bank (M) & Other Appeals* [2011] 7 CLJ 909, the appeal had arisen from the decision of the Court of Appeal. In affirming the High Court decision to strike out the appellants' action against the respondent, which was the financing bank, the appellants alleged in essence that the SPA entered into between the appellants and the developer was void in law for having contravened the law, and consequently, the financing agreements which the appellants had signed with the financial institutions was void and of no effect. In dismissing the appeal, Zulkefli Makinudin FCJ (later CJ Malaya), held:

> [12] We shall first deal with the third question framed in this appeal as this deals with the duty of any of the respondents to enquire. The appellants take the view that there is a duty on the part of the respondent to enquire into the legality of the SPA. It is our considered view this is not a tenable proposition for the following reasons.
>
> [13] The respondent is not a party to the SPA. The SPA is the respective appellant's contract with the developer. Therefore, the duty is cast on the appellants rather than the respondent to ensure that the SPA is free from any legal infirmity. If they have omitted to do so, we are of the view they cannot rely on their default to defeat the respondent's claim to repay their loans. On this point we would cite the case of *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31 wherein Gopal Sri Ram, JCA (as he then was) at p. 39 had this to say:
>
> > If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim.

A [14] It is also our considered view that the respondent has no duty to advise the appellants as borrowers in the present case because it is merely a financing bank and not an advisory bank. Generally speaking, in a commercial loan a lender is entitled to seek and obtain the best terms it can. It may have regard solely to its own commercial interest. It is not the lender's obligation to ensure that the borrower has made a correct or wise
B commercial decision based upon a full understanding of all risks unless the borrower has specifically sought the lender's advice. (See the case of *Redmand v. Allied Irish Bank Plc* [1987] FLR 307).

[15] It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume
C that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of
D commerce ... .

[29] In the circumstances, even if this court were to ignore the defendants' shortcoming in the notice of application or in the affidavit-in-support and to proceed to consider the stay application in accordance with the principles decided by the Court of Appeal in *Ling Peek Hoe* case (*supra*), this is still not
E a proper case for the court to grant a stay of proceedings in the present suit pending the outcome of the SPA suit against developer.

[30] In the further alternative, even if this court were to apply the test of nugatoriness or special circumstances to an application for stay of
F proceedings, the result is still the same, ie, this present case is not appropriate for grant of stay. In the defendants' affidavits, there is no allegation or evidence that the developer would be unable to pay monetary compensation to the defendants if the defendants were to succeed in their claims against the developer in the SPA suit against developer. In the SPA suit against developer, the defendants-purchasers are trying to avoid or rescind the sale
G and purchase agreement with the consequential effects of returning the property to the developer, recovering monetary compensation from the developer and ancillary reliefs. The bank-chargee's foreclosure sale of the said property, which property the purchaser-borrowers according to their SPA suit against developer also do not want to retain, would not render the
H subject-matter of the SPA suit against developer in any way nugatory. The proceeds of sale in the foreclosure proceeding would be used to settle the purchasers-borrowers' outstanding loan and accrued interests. If the purchasers-borrowers were to succeed in their claims in the SPA suit against developer, the purchasers-borrowers would still recover monetary
I compensation against the developer.

[31] As explained above, irrespective of the legal principles to be applied to the defendants' encl. 8 application for stay of proceedings, it is still not appropriate for this court to grant a stay of proceedings in the circumstances of our present case.

[32] In this regard, it is also pertinent to note that if the court were to grant a stay of foreclosure proceedings pending the outcome of the borrowers-purchaser's suit against the developer or vendor wherein the borrower-purchaser alleges misrepresentation or breach or any vitiating circumstance to avoid or rescind the sale and purchase agreement, then all foreclosure proceedings by banks and financial institutions would similarly be liable to be easily stayed and delayed by the borrowers-purchasers, as what the borrowers-purchasers need to do is merely to file a court suit against the developer or vendor with allegations to avoid or rescind the sale and purchase agreement. Such stay of foreclosure proceedings would be very detrimental to the banking and financing system as a whole. As wisely observed by the Federal Court in *Chang Yun Tai & Ors v. HSBC Bank (M) & Other Appeals* (*supra*), "banking business will be rendered impracticable and burdensome if this was so. In this regard the courts should not impose such a requirement that may impede the flow of commerce". The court should not exercise its discretionary power in a way or to an extent which renders banking business impracticable or burdensome or which impedes the flow of commerce.

Conclusion

[33] By the aforesaid reasons, this court held on 4 January 2021 that the defendants' application in encl. 8 for stay of proceedings be dismissed with costs of RM4,000 subject to allocatur.